Nos. 83-485 and 83-484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Respondents.

CAPTION CONTINUED ON NEXT PAGE

JAMES SLEVIN, MARK SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

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Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does the New York City Financial Disclosure Law, New York City Administrative Code, §1106-5.0, as amended by Local Law No. 48 of 1979, violate any constitutionally protected right of privacy of the petitioner classes?

TABLE OF CONTENTS

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STATEMENT OF THE CASE

(1)

These cases are class actions brought pursuant to 42 USC §1983 by New York City police officers (Barry v. City of New York), fire officers (Slevin v. City of New York), and their spouses challenging the constitutionality of New York City Administrative Code, §1106-5.0, as amended by Local Law No. 48 of 1979. The law requires candidates for City office, elected officials, agency heads, members of City boards and commissions who receive compensation, employees in the City's managerial pay plan and all other City employees earning annual salaries of $30,000 or more to file with the City Clerk annual reports disclosing certain financial interests, and makes such reports available for public inspection. The statute also contains a procedure by which a person required to file a financial disclosure report can assert a privacy claim against public disclosure of a portion or all of the information contained in the report.

The petitioner class in Barry consists of police officers of the rank of captain and above and their spouses. This class, out of a total force of 25,000 police officers, includes approximately 250 captains, 80 deputy inspectors, 40 inspectors, 20 deputy chiefs, 10 assistant chiefs, 5 bureau chiefs and 1 chief of operations. All ranks above the rank of captain are non-civil service and are appointees of the police commissioner. The Barry class also includes lieutenants designated as supervisors of detective squads and/or special assignment, and police surgeons. Police surgeons are physicians who are members of the uniformed force and treat police officers and determine their fitness for duty.

The petitioner class in Slevin consists of battalion chiefs, deputy chiefs and medical officers of the Fire Department and their spouses. At the time the litigation was commenced, the Fire Department employed approximately 80 deputy chiefs, 280 battalion chiefs and 10 medical officers out of a total force of 9,500 firefighters. The

primary duty of deputy chiefs and battalion chiefs is to supervise firefighting operations. Battalion chiefs supervise five to eight fire companies, and deputy chiefs supervise three or four battalions. Medical officers, like their counterparts in the Police Department, supervise the treatment of firefighters and determine their fitness for duty.

In addition to their firefighting responsibilities, battalion chiefs and deputy chiefs have broad responsibility for supervising fire inspections within the areas of their commands (Slevin, Joint Appendix, pp. 391-393, 399-404). In addition, chiefs hold important supervisory positions in the Fire Department's Bureau of Fire Prevention, which inspects major buildings and structures, and in its Maintenance and Communications Divisions, whose responsibilities include the purchase of new equipment and spare parts (Slevin, Joint Appendix, pp. 377-381, 396-399).

Facts

(1)

Legislative History of §1106-5.0

Administrative Code, §1106-5.0 was initially enacted by the City Council in 1975 (Local Law No. 1 of 1975). As originally enacted, §1106-5.0 required the Mayor, the City Council President, the members of the City Council, the five Borough Presidents, the City Comptroller and declared candidates for those positions, as well as each commissioner or agency head, assistant commissioner or assistant agency head, board member, and city employee whose salary was $25,000 or more, to file with the City Clerk not later than June thirtieth of each year a report disclosing certain financial interests.

Each person filing a report was, and after subsequent amendments to the statute still is, required to list the following items on behalf of himself or herself and his or her spouse (§1106-5.0, subd. b):

The name, address and type of practice of any professional organization in which the person reporting or his spouse was an officer, director, partner, proprietor, employee or advisor from which income of $1,000 or more was derived during the preceding calendar year.

The source of any income of $1,000 or more received during the preceding calendar year for services rendered.

Any capital gain from a single source of $1,000 or more other than from the sale of a residence occupied by the filer.

Reimbursement for expenditures of $1,000 or more in each instance.

Honoraria from a single source in an aggregate amount of $500 or more and any gift in the aggregate amount of $500 or more from any single source received during the preceding year.

Each creditor to whom the person reporting or his spouse was indebted for a period of ninety consecutive days or more during the preceding calendar year in an amount equal to or exceeding $5,000.

Each investment or parcel of real estate in which a value of $20,000 or more was held at any time

during the preceding calendar year based on its cost or if acquired by means other than purchase, its estimated value at the time of receipt.

The identity of each trust or other fiduciary relation in which a beneficial interest was held during the preceding calendar year having a value of $20,000 or more.

The statute does not require the filer to disclose the precise amount of the income, investments and indebtedness items required to be disclosed. Rather, it requires only approximate disclosure within broad dollar ranges. (§1106-5.0, subd. b (6)(a)(b)(c)) Thus, with respect to income derived from services rendered, including services rendered to professional organizations, reimbursements or capital gains other than from the sale of a personal residence, the filer checks an appropriate box on the report indicating whether the income received by him or his spouse was at least $1,000 but less than $5,000, at least $5,000 but less than $25,000, at least $25,000 but less than $100,000, or in excess of $100,000. Similar

categories are provided for gifts and honoraria with the addition that the filer can check a box indicating that the gift or honoraria was between $500 and $1,000. With respect to indebtedness, the person filing the report checks the appropriate box indicating whether his or his spouse's debt was at least $5,000 but less than $25,000, at least $25,000 but less than $100,000, at least $100,000 but less than $500,000 or was $500,000 or greater. Lastly, with respect to investments, trusts and fiduciary relationships, and real property holdings, the categories are: at least $20,000 but less than $100,000, at least $100,000 but less than $500,000 and $500,000 or greater. Intentional violations of §1106-5.0 constitute a misdemeanor punishable by imprisonment for not more than one year or a fine not to exceed $1,000 or both (§1106-5.0, subd. g).

Local Law No. 1 of 1975 made the financial disclosure reports available to taxpayers. Unlike the law now being challenged, however, it did not establish a procedure by which a person making a

report could claim that its public disclosure would invade his or her privacy.

(2)

In June 1975 a class action was commenced in the Supreme Court of the State of New York on behalf of all individuals in the competitive and non-competitive classes of the civil service of the City earning annual salaries of $25,000 or more, challenging the constitutionality of Local Law No. 1 of 1975, inter alia, on the ground that it violated the privacy rights of the class under the United States Constitution. That action was rejected by the State Supreme Court in Hunter v. City of New York, 88 Misc. 2d 562 (Sup. Ct., N.Y. Co., 1976). On appeal, the Appellate Division, First Department of the Supreme Court held that the City Council could enact a provision requiring that class of employees and their spouses to make public disclosure of their financial interests, but held Administrative Code, §1106-5.0 infirm on the ground that it did not afford a covered employee the opportunity to present a

claim that the public disclosure of an item contained in the report would unnecessarily intrude upon the employee's privacy. Hunter v. City of New York, 58 AD 2d 136, 396 NYS2d 186 (1977). The New York Court of Appeals unanimously affirmed the order of the Appellate Division, First Department on the opinion of that Court. 44 NY 2d 708, 376 N.E.2d 928, 405 NYS2d 455 (1977).

In 1979 the City Council acted to correct the constitutional infirmity in §1106-5.0 which was found to exist by the Court in Hunter. In addition, it made other changes with respect to its scope of coverage (Local Law No. 48 of 1979). The Council adopted a procedure whereby an employee could assert a privacy claim with respect to any items contained in his or her financial disclosure report. Any person required to file a report is permitted, at the time the report is filed or at anytime thereafter, except when a request for public inspection is pending, to submit a request to withhold any item disclosed therein from public

inspection on the grounds that such inspection would constitute an "unwarranted invasion of his or her privacy" (§1106-5.0, subd. d[1]). Privacy requests must be made in writing and must set forth the basis for the claim. The financial disclosure report form provides space for an individual to make a privacy claim and to set forth the basis for that claim (JA29-32).[1] Privacy requests are evaluated by the public members of the New York City Board of Ethics, a board consisting of three public members, in addition to the Corporation Counsel and City Personnel Director. The Board of Ethics is established by New York City Charter, Chapter 68 (§2600 et seq.) to render advisory opinions to City officers and employees with respect to questions of ethical conduct, conflicts of interest and other matters arising under that chapter of the City Charter (Charter, §2602, subd. [a]). In determining

[1]Numbers in parentheses preceded by "JA" refer to the pages of the joint appendix in Barry. Other numbers in parentheses refer to the appendix to the Barry petition.

whether public inspection of an item would constitute an unwarranted invasion of privacy, the Board of Ethics must consider the following factors (§1106-5.0, subd. d[2]):

> "(a) whether the item is of a highly personal nature;
>
> (b) whether the item in any way relates to the duties of the position held by such person [making the privacy request];
>
> (c) whether the item involves an actual or potential conflict of interest."

The Board of Ethics is empowered to establish procedures for consideration of privacy requests. The procedure, inter alia, permits the filer to appear before the Board in person or by writing to state the basis for the claim that the information should be withheld from the public (§1106-5.0, subd. d[3]).

In instances where a person has asserted a privacy claim, the disclosure report is sealed and kept in the office of the City Clerk. A privacy claim is not evaluated by the Board of Ethics unless

a member of the public requests permission in writing to inspect an item contained therein (JA 345). At that time, the City Clerk refers the request for public inspection and the financial disclosure report, including that portion of the report in which the filer states the basis for his privacy request, to the Board of Ethics for evaluation (JA 345). The City Clerk also notifies the employee that a request has been made to inspect his report and that the matter has been referred to the Board of Ethics (JA 346).[2] The employee is reminded of his right to appear before the Board, and is offered the opportunity to submit additional material in support of his claim (JA 346). Determinations by the Board of Ethics are in writing and set forth the reasons for the determination (§1106-5.0, subd. d[4]).

[2]Persons filing financial disclosure report forms are always notified when a member of the public seeks to inspect his or her report regardless of whether a privacy request has been claimed by the employee.

If the privacy claim is sustained, the parties are notified, and the disclosure report, with the item or items adjudged to warrant privacy protection deleted from the report, is returned to the City Clerk (JA 346). If the privacy request is not upheld, the person filing the privacy claim is so notified by the Board of Ethics and is afforded the opportunity to request a rehearing by the Board and to submit additional material (JA 347). He is also advised of his right to seek judicial review of the Board's determination (JA 347). The employee is allowed ten days to determine his course of action, thus affording him the opportunity to seek judicial relief, including injunctive relief, by way of a proceeding in state court. If the Board does not hear from the employee within ten days, the report is returned to the City Clerk and made available for public inspection without deletion (JA 347). That portion of the financial disclosure report in which the filer discusses the basis for the assertion of the

privacy claim is never made available for public inspection (347).

In addition to establishing a privacy procedure, Local Law No. 48 of 1979 contained several other amendments. Employees in the City's managerial pay plan were made subject to §1106-5.0 regardless of their salary, and the minimum salary level at which other City employees are required to file reports was increased from $25,000 to $30,000.[3]

The Board of Ethics has been called upon to make twenty-six determinations of privacy claims since the enactment of Local Law No. 48. Sixteen of those claims were sustained by the Board of Ethics, six were withdrawn by the employees and one was otherwise disposed of (JA 347). Only three privacy requests have been denied by the Board (JA 347). Those three requests were denied because the filers failed to provide the Board of Ethics with

[3]The City administration has recently transmitted to the City Council a bill which, if enacted, would increase the filing threshold from $30,000 to $42,000.

additional information supporting their claims (JA 349).

(3)

The Litigation Challenging Local Law No. 48 of 1979

On September 4, 1979, plaintiffs commenced the instant action on their own behalf and on behalf of others similarly situated. District Court Judge Abraham Sofaer granted a preliminary injunction prohibiting the City from enforcing §1106-5.0, as amended by Local Law No. 48 of 1979, with respect to the plaintiff classes.

Following hearings on these cases, the District Court concluded that §1106-5.0 was constitutional insofar as it required disclosure to City government, but unconstitutional with respect to public inspection of the plaintiffs' reports (41a-103a). It held that government access to the reports would help to root out corruption and conflicts of interest. The Court observed (70a):

> "Corruption and more subtle conflicts of interest are possible in each group of plaintiff employees. That no corruption has been proven among several groups of plaintiffs does not establish that improprieties have not occurred or would never be deterred or uncovered by the filings."

The Court also rejected the argument that the inclusion of information relating to the spouse's activity would significantly affect decisions to marry, procreate or to make other intimate family decisions protected by the Constitution (67a).

The District Court held that the public disclosure of the reports in the case of persons who are neither elected officials nor "policymakers" did not serve any useful public purpose (80a-93a). It also concluded that the financial disclosure reports would be made readily available to members of the public, including salesmen, neighbors, relatives, former spouses, and business and charitable organizations (74a).

The Court of Appeals

In addition to the appeal by the City, the petitioners in Slevin cross-appealed from that portion of the District Court's judgment which held that financial disclosure to the government was permissible. The Court of Appeals in unanimously upholding the statute in all respects, stated (12a):

> "We think the statute as a whole plainly furthers a substantial, possibly even a compelling, state interest. The purpose of the statute is to deter corruption and conflicts of interest among City officers and employees, and to enhance public confidence in the integrity of its government. * * * Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread, see Slevin v. City of New York, supra 557 F. Supp. at 919 n. 1, and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest."

The Court rejected the Slevin petitioners' contention that because of the Fire Department's corruption-free history, financial disclosure serves no legitimate purpose as applied to them, noting (14a):

> "In our view, the City Council could reasonably conclude that LL 48 [Local Law No. 48 of 1979, which amended Administrative Code, §1106-5.0] would help deter corruption and conflicts of interest in the Fire Department, despite its 'virtually corruption-free history.'"

With respect to the issue of public inspection of the reports, the Court stated (16a):

> " We do not think that the right to privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest. Nor do we think the release of information that is not 'highly personal' rises to the level of a constitutional violation."

After analyzing the statute's procedure for allowing an employee to assert a privacy claim with respect to any items contained in his or her report, the Court concluded (15a):

> "Unlike the district court, however, we think that the statute's privacy mechanism adequately protects plaintiffs' constitutional privacy interests."

It noted, moreover, that the City's interest in public disclosure of the reports "outweighs the possible infringement of plaintiffs' privacy interests."

The Court of Appeals agreed with the City's argument that public disclosure of the reports will encourage City agencies "to be aggressive in their efforts to police corruption" and will enhance public confidence in government. In this regard the Court found (20a):

> "In this case, we cannot say that it was unreasonable for the City Council to conclude that public disclosure would materially advance the City's attempt to prevent corruption and conflicts of interests."

The Court also held that public disclosure need not be limited to elected officials and those occupying "policymaking" positions. It also sustained the $30,000 threshold for filing, observing (21a):

> * * * the burden imposed by an imprecise classification, and by the broad nature of the required disclosure, is mitigated by the

statute's privacy mechanism, which permits covered employees to challenge the proposed release of irrelevant 'highly personal' information. Accordingly, we cannot say that the law is unconstitutionally overbroad or that it violates the constitutional right to privacy."

ARGUMENT

NEW YORK CITY ADMINISTRATIVE CODE, §1106-5.0 SERVES THE VITAL GOVERNMENTAL PURPOSE OF DISCOURAGING AND EXPOSING CORRUPTION AND CONFLICTS OF INTEREST. THE STATUTE DOES NOT VIOLATE ANY CONSTITUTIONALLY PROTECTED RIGHT OF THE MEMBERS OF THE PETITIONER CLASSES. THE CHALLENGED STATUTE SPECIFICALLY ESTABLISHES A PROCEDURE WHEREBY ANY EMPLOYEE REQUIRED TO FILE A FINANCIAL DISCLOSURE REPORT MAY AVOID PUBLIC INSPECTION OF ANY ITEM CONTAINED THEREIN BY DEMONSTRATING THAT THE ITEM IS OF A HIGHLY PERSONAL NATURE, IS NOT INDICATIVE OF A CONFLICT OF INTEREST, AND IS UNRELATED TO HIS OR HER DUTIES.

The New York City financial disclosure statute does not violate any constitutionally protected privacy right of the petitioner classes. This Court has long recognized a protected interest in being free from improper state action which directly impacts on personal autonomy or decision

making in the area of marriage, procreation, contraception, abortion and the creation maintenance and termination of the family relationship. See City of Akron v. Akron Center for Reproductive Health Inc., ____ U.S. ____, 76 L. Ed. 687, 700-701 (1983); Zablocki v. Redhail, 434 U.S. 374, 386, 387 n. 12 (1978); Califano v. Jobst, 434 U.S. 47, 54 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977), Paul v. Davis, 424 U.S. 693 (1976); Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 338 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Financial disclosure laws, however, do not implicate this aspect of privacy because they do not directly or substantially effect intimate family and personal

matters such as a decision to marry, beget children or maintain a family relationship. Plante v. Gonzalez, 575 F. 2d 1119, 1131-1132 (5th Cir., 1979), cert. den. 439 U.S. 1009 (1979); Duplantier v. United States, 606 F. 2d 654, 669-670 (5th Cir., 1979), cert. den. 449 U.S. 1076 (1981); Montgomery Co. v. Walsh, 336 A. 2d 97 (Ct. of Appeals, Md., 1975), app. dism'd 424 U.S. 901 (1976); Illinois Employees Assn. v. Walker, 315 N.E. 2d 9 (Sup. Ct., Ill., 1974), cert. den. sub. nom. Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974); Snider v. Thornburgh, 436 A. 2d 593, 598 (Sup. Ct., Penn., 1981); Gideon v. Alabama State Ethics Commission, 379 So. 2d 570, 572 (Sup. Ct., Ala., 1980).

In Whalen v. Roe, 429 U.S. 589, 605 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 457-465 (1977), this Court appeared to recognize a protected privacy interest in avoiding "unwarranted disclosures" of personal matters. In considering whether public inspection of the financial disclosure reports would violate this

confidentiality aspect of the privacy right, the Court of Appeals correctly observed (16a):

> "We do not think that the right to privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest. Nor do we think the release of information that is not 'highly personal' rises to the level of a constitutional violation."

Highly personal information contained in a financial disclosure report which is unrelated to the duties of the filer and which is not indicative of a conflict of interest is protected from public disclosure under the statute. Specifically, subdivision d(1) of §1106-5.0 permits an employee at the time the disclosure report is filed or at anytime thereafter, except when a request by a member of the public for inspection is pending, to assert that the public disclosure of any item or items contained in the report would constitute an unwarranted invasion of privacy. In determining whether the public disclosure of an item would constitute an

unwarranted invasion of privacy, subdivision d(2) of §1106-5.0 requires the Board of Ethics to consider:

> "(a) whether the item is of a highly personal nature;
>
> (b) whether the item in any way relates to the duties of the position held by such person;
>
> (c) whether the item involves an actual or potential conflict of interest."

The Court of Appeals concluded that this statutory procedure affords covered employees adequate protection from unwarranted disclosures, and noted that out of the twenty-six privacy requests that have come before the Board of Ethics for review since 1979 (16a):

> "***[s]ixteen were granted, six were withdrawn, and one was 'otherwise disposed of'. Only three privacy claims were denied, apparently because insufficient information was provided in support of the claims."

In view of the fact that the statute contains a procedure which protects against the

unwarranted disclosure of highly personal information and has been construed administratively in the great majority of cases in favor of employee requests for privacy, we respectfully submit that this case does not present any issue concerning the right of privacy which is worthy of review by this Court.

Moreover, public disclosure of financial interests is accomplished by a method which is least intrusive to the privacy interests of the covered officers and employees. The provision is narrowly drawn to serve only its intended purpose. Precise disclosure of every aspect of the financial status of an employee or his spouse is not required. The provision requires disclosure only with respect to those financial transactions which may be indicative of wrongdoing or conflicts of interest, i.e., gifts, loans, reimbursement of expenditures, income from services rendered, etc. In addition, disclosure must be made only when a particular transaction or interest exceeds a specified minimum amount.

Thus, for example, an investment need not be reported unless it is valued at $20,000 or more. The disclosure report is not a net worth statement, and the specific amount of a reportable transaction or interest need not be noted. A covered employee makes disclosure only within fairly broad dollar ranges.

The Court of Appeals further held that the City's interest in public disclosure "outweighs the possible infringement of plaintiffs' privacy interests" (19a). In Hunter v. City of New York, supra, 58 AD2d 136, 396 NYS2d 186, aff'd 44 NY2d 708, 376 N.E.2d 928, the Appellate Division of the State Supreme Court stated (at 57 AD2d 137) that the purpose of §1106-5.0 is to:

> "*** discourage and detect corruption and the appearance of corruption, avoid conflicts of interest and instill in the public a sense of confidence in the integrity and impartiality of its public servants."

The United States Court of Appeals held that the statute "plainly furthers a substantial, possibly even

a compelling, state interest" (12a). This Court has recognized a compelling state interest in the maintenance of an honest police force and civil service. Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977).[4]

Public disclosure of financial reports is particularly appropriate in the case of superior officers of police and fire departments. The members of the petitioner classes occupy the very

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[4]The Court of Appeals ruled that §1106-5.0 must be analyzed under an intermediate standard of review or balancing approach, noting (11a):

"***an intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality aspect."

While we believe that §1106-5.0 meets any constitutional test, including the compelling state interest test, this Court, in Plyler v. Doe, 457 U.S. 202, 217-218 (1982), has indicated that legislation will be sustained under the intermediate standard of review if it "may fairly be viewed as furthering a substantial interest of the state." This would suggest that a balancing of the interests is not required under the intermediate level of review.

highest positions in their uniformed services and are responsible for making decisions, enforcing laws, and taking action which directly effects the lives, safety, and property of every person who lives and works in New York City. The Court of Appeals agreed with the District Court's finding that "[c]orruption and more subtle conflicts of interest are possible in each group of plaintiff employees" (14a). The concern addressed by §1106-5.0 is not limited to the blatant bribe, but relates also to other forms of inappropriate behavior or conflicts of interest. For example, a supervisor or his or her spouse may have investments or a mortgage in the area of his or her command. A police surgeon or Fire Department medical officer may receive payments from insurance companies hoping to sell injured or disabled officers policies to supplement their benefits. A person covered by the provision or his or her spouse may be receiving gifts, loans, honoraria or reimbursements for expenses from those he or she must police, regulate or

otherwise protect, or may have joint business interests or investments with such persons.

Public disclosure of financial reports acts as a prod to City government to be continually aggressive in its anti-corruption and conflicts of interest efforts. Agencies will be aware that if they do not vigorously investigate evidence of misconduct revealed by a report, then a newspaper, a public interest group or a concerned citizen that has access to the information can hold them accountable for their failure to act. Thus, public disclosure makes it more difficult for an agency to refuse to confront the problems of employee misconduct. The public, on the other hand, has a means by which to judge whether City government is making sincere efforts to guard against corruption and misconduct. More importantly, public confidence in its servants will be greatly enhanced because the reports will demonstrate that the vast majority of the officers and employees are honest. Dishonest officers and

employees may no longer rely on agency inaction to protect them from disclosure of misconduct. Intentional failure to report the information called for by the report constitutes a crime which is punishable by fine or imprisonment. A conviction for a violation of the reporting requirements of §1106-5.0 would likely result in an automatic vacatur of a police or fire officer's employment, pursuant to N.Y. Public Officers Law, §30, subd. 1(e). See Greene v. McGuire, 683 F. 2d 32 (2nd Cir., 1982); Pesale v. Beekman, 81 AD2d 590, 437 NYS2d 448 (1st Dept., 1981), aff'd 54 NY2d 707, 426 NE2d 483, 442 NYS2d 989 (1981). Thus, the prospect of criminal prosecution for intentional violations of the law and the consequential loss of employment upon conviction will tend to deter individuals who might have otherwise engaged in wrongful or questionable conduct, and can help insure that governmental services wil be provided (and, in the case of police officers and firefighters, the law will be enforced) in an even-handed and nondiscriminatory manner.

The Court of Appeals agreed with the City that public disclosure of the reports would have this salutary effect, holding (20a):

> "In this case, we cannot say that it was unreasonable for the City Council to conclude that public disclosure would materially advance the City's attempt to prevent corruption and conflicts of interest."

Financial disclosure need not, as petitioners maintain, be limited to those persons holding elective office or occupying "policymaking" positions. The threat of corruption and conflicts of interest are obviously not limited to persons exercising policymaking authority, and the public's concern with misconduct extends beyond elected and policymaking officials. The use of a specific salary threshold to trigger disclosure is not improper. In general, salary is directly related to the importance of the functions of an employee, and, therefore, unfaithful conduct by persons earning higher salaries is usually more damaging to society's interests than misconduct by those earning

low salaries. Significant numbers of New York City employees at the $30,000 level (and even below) occupy positions of great public trust.[5]

The determination whether financial disclosure should be required and the categories of employees to be covered by such a statute should be left to the appropriate legislative body. In Whalen v. Roe, supra, this Court stated at 429 U.S. 597:

> "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."

[5]The petitioners in the instant cases earn salaries which are substantially in excess of the $30,000 threshold. For example, deputy fire chiefs and deputy police inspectors earn between approximately $48,000 to $58,000, exclusive of overtime and fringe benefits. Police captains and Fire Department battalion chiefs earn between approximately $43,500 and $51,500, exclusive of overtime and fringe benefits.

Legislative classifications of this nature are controlling unless very wide of any reasonable mark. Buckley v. Valeo, 424 U.S. 1, 83, 103 (1976). The Court of Appeals concluded that both the categories of employees required to disclose and the nature of the disclosure itself is "mitigated by the statute's privacy mechanism, which permits covered employees to challenge the proposed release of irrelevant 'highly personal' information" (21a).

Financial disclosure provisions have withstood constitutional challenge because they serve an important public need for efficient and ethical conduct among public employees and instill public trust and confidence in government by assuring citizens of the impartiality and honesty of their servants. See Duplantier v. United States, supra, 606 F.2d at 671-673; Plante v. Gonzalez, supra, 575 F.2d at 1135; O'Brien v. DiGrazia, 544 F. 2d 543 (1st Cir., 1976), cert. den. sub. nom. O'Brien v. Jordon, 431 U.S. 914 (1977); Montgomery Co. v. Walsh, supra, 336 A.2d 97, (Ct. of Apps., Md., 1975)

app. dism'd 424 U.S. 901 (1976); Fritz v. Gorton, 517 P.2d 911 (Sup. Ct., Wash., 1974) app. dism'd 417 U.S. 902 (1974); Stein v. Howlett, 289 N.E.2d 409 (Sup. Ct., Ill., 1972) app. dism'd 412 U.S. 925 (1973); Illinois State Employees' Assn. v. Walker, supra, 315 N.E. 2d 9 (Sup. Ct., Ill., 1974), cert. den. 419 U.S. 1058 (1974); Gideon v. Alabama State Ethics Commission, 379 So. 2d 570 (Sup. Ct., Ala., 1980); Opinion of the Justices to the Senate, 376 N.E.2d 810, 818 (Sup. Jud. Ct., Mass., 1978); Goldtrap v. Askew, 334 So. 2d 20 (Sup. Ct., Fla., 1976); County of Nevada v. MacMillen, 522 P. 2d 1345 (Sup. Ct., Calif., 1974).

As noted in the above citations, this Court has consistently declined to review decisions upholding financial disclosure laws. At page 29 of the petition in Slevin, it is stated that a number of those denials took place prior to this Court's recognition of the confidentiality aspect of privacy discussed in Whalen v. Roe, supra, 429 U.S. 589 and Nixon v. Administrator of General Services, supra,

433 U.S. 425. They fail to note, however, that the denials of the petitions for certiorari in Plante v. Gonzalez and Duplantier v. United States took place after the decisions in Whalen and Nixon.

Duplantier is particularly noteworthy. In that case, the United States Court of Appeals for the Fifth Circuit sustained the Ethics in Government Act of 1978 (P.L. 95-521, which is set forth in 5 USC App. §201 et seq.; 2 USC §701 et seq.; 28 USC App. §301 et seq.). Duplantier concerned the application of that law to federal judges. The Ethics in Government Act requires that certain members of the executive, legislative and judicial branches of the federal government file annual financial disclosure reports:

> "***containing a full statement of assets, income, and liabilities, and those of their spouses and dependent children." (Duplantier v. United States, 606 F. 2d at 659)

The federal act makes the reports available for public inspection (28 USC App. §305; 5

USC App. §205; 2 USC §704), but unlike the statute challenged in the instant case, it does not require that the person filing the disclosure report be notified prior to public disclosure, nor may such a person assert a claim that the public disclosure of an item contained in the report would constitute an unwarranted invasion of privacy. The Court of Appeals in the instant case relied on Duplantier in stating (18a):

> "We note by way of comparison that courts have upheld financial disclosure laws that hit much closer to home and do not have any similiarly broad privacy mechanism."

At page 30 of the petition in Slevin, the petitioners incorrectly state that the issue:

> "*** presented in this case is whether every public employee and his/her spouse may be required, consistently with the Constitution, to reveal at large all personal information as a condition of employment." (Emphasis added.)

All that is at issue in this case is whether §1106-5.0 is constitutional as applied to the members of the petitioner classes, high ranking uniformed officers of the Police and Fire departments (Slevin petition, p. 2; Barry petition, p. 3). The provision does not mandate that "all personal information" be revealed, but rather only certain specified financial transactions by them and their spouses which might be used as covers for wrongdoing or conflicts of interest. Nor must all the information contained in the reports be "revealed at large". We have stressed throughout that a covered employee may avoid public disclosure of any highly personal item contained in the report which is unrelated to his or her duties and which does not indicate a conflict of interest, and that the vast majority of privacy applications which have come before the Board of Ethics for review have been decided in favor of the employee.

In view of the findings by the Court of Appeals that the statute serves very important

governmental interests and is sensitive to the legitimate privacy interests of the employees to whom it applies, we respectfully submit that review by this court is unwarranted.

CONCLUSION

The petitions for certiorari should be denied.

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Respectfully submitted,

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